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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CALVIN BUSSEY; ERNEST O. AVERY [MEMBERS OF THE BOARD OF DEACONS]; AND EARL G. JONES [MEMBER OF THE BOARD OF TRUSTEES] OF ST. PHILLIPS BAPTIST CHURCH, INCORPORATED

Petitioners,

vs.

REV. ANDRE H. OWENS, [PASTOR OF ST. PHILLIPS BAPTIST CHURCH],

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE EXERCISE OF PLENARY JURISDICTION BY A CIVIL COURT IN A DISPUTE BETWEEN THE BOARD OF TRUSTEES AND THE BOARD OF DEACONS OF A RELIGIOUS INSTITUTION AND IT'S PASTOR POSES A "SIGNIFICANT RISK" OF FIRST AMENDMENT INFRINGEMENT?

2. WHETHER CIVIL COURTS MUST DECLINE SUBJECT MATTER JURISDICTION, SUA SPONTE, IN A DISPUTE BETWEEN THE PASTOR AND THE BOARD OF DEACONS AND BOARD OF TRUSTEES OF A RELIGIOUS INSTITUTION IN ORDER TO AVOID UNNECESSARY ENTANGLEMENT IN MATTERS OF CHURCH GOVERNMENT, AND MATTERS OF FAITH AND DOCTRINE?

3. WHETHER THE FILING OF A CIVIL ACTION IN A CIVIL COURT BY MEMBERS OF THE BOARD OF DEACONS AND BOARD OF TRUSTEES AGAINST THE PASTOR OF A RELIGIOUS INSTITUTION CONSTITUTES A WAIVER OF CONSTITUTIONAL IMMUNITY PROTECTING A CHURCH'S PRACTICES FROM JUDICIAL SCRUTINY?

4. WHETHER OR NOT MEMBERS OF THE BOARD OF TRUSTEES AND THE BOARD OF DEACONS MAY BRING A CLASS ACTION ON BEHALF OF THEMSELVES AND MEMBERS OF THE CONGREGATION OF A RELIGIOUS INSTITUTION IN ORDER TO SEEK A DECLARATORY JUDGMENT OR ORDER AS TO WHETHER THE BOARDS HAD AUTHORITY TO EFFECT A PASTOR'S DISCHARGE, AS SEPARATE AND DISTINCT FROM WHETHER THE BOARDS' DECISION WAS RIGHT OR WRONG?

PARTIES TO THE PROCEEDINGS

The parties to the consolidated appeals in the court below were those named in this Petition. Other members of the Board of Deacons and the Board of Trustees, not identified by names in the appeals below but who were named as Plaintiffs in Civil Action Number 90-CA009481, were as follows; Bobbye Sears and James Branch, [MEMBERS OF THE BOARD OF DEACONS OF ST. PHILLIPS BAPTIST CHURCH], and Judy Davis, Floyd Grayson, Wilbert Jones, and Willie Foster, [MEMBERS OF THE BOARD OF TRUSTEES OF ST. PHILLIPS BAPTIST CHURCH].

All parties to this proceeding, along with Rev. Andre H. Owens, Pastor of St. Phillips Baptist Church, were also parties to the consolidated appeals in the court below.

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PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review a judgment and opinion of the District of Columbia Court of Appeals entered in this case on January 18, 1995.

OPINIONS BELOW

The Memorandum Opinion and Judgment by the District of Columbia Court of Appeals appears in the Appendix hereto at E-1. [The decision is unreported]. An order denying the petition for rehearing by the District of Columbia Court of Appeals appears in the Appendix hereto at J-1 and is unreported.

The Consent Agreement entered into by the parties and validated by the Court's signature [from which this action arose] appears in the Appendix hereto at A-1.

The Memorandum and Order of the Superior Court of the District of Columbia appears in the Appendix hereto at B-1 and is unreported.

The Order of the superior Court of the District of Columbia appears in Appendix hereto at C-1. The Order of the Superior Court of the District of Columbia appears in the Appendix hereto at C-3.

The Memorandum and Order of the Superior Court in a consolidated case, [C.A. No. 93-5542, the class action seeking declaratory judgment] appears in the Appendix here to at D-1.

JURISDICTIONAL STATEMENT

The Memorandum Opinion and Order of the District of Columbia Court of Appeals were entered on December 15, 1994. The Order of the District of Columbia Court of Appeals denying rehearing was entered on January 18, 1995. This Petition has been filed within 90 days of that date.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I to the United States Constitution, with specific reference to the free exercise and establishment clauses thereunder.

STATEMENT OF THE CASE

The original action out of which this case arose was brought by the Members of the Board of Deacons and the Board of Trustees of St. Phillips Baptist Church. Petitioners named Rev. Andre H. Owens, as Defendant and who is the Respondent named herein.

On August 16, 1970, Petitioners filed a Complaint in the Superior Court of the District of Columbia. The Complaint was styled as follows:

> "Complaint for Wrongful Removal of Members of the Joint Board of St. Phillips Baptist Church, Inc., Illegal Takeover of Church Business and Legislative Affairs, and to Present Church Finances." [Appendix I-1]

Petitioners, including themselves, named seven (7) other persons, three {3) of whom were members of the Board of Deacons and four (4) of whom were members of the Board of Trustees of St. Phillips Baptist Church.

The trial court convened an evidentiary hearing on the Respondent's Motion to Dismiss the Complaint and the Petitioners' Opposition thereto. A hearing was held on August 24, 1990. Prior to entry of an Order adjudicating the Motion to Dismiss, the parties entered into a Consent Agreement. [Appendix A-1]. The trial court adopted the Consent Order and affixed the Court's signature thereto.

The dispute between Petitioners and the Respondent continued. Both parties filed Motions to Enforce the Consent Agreement. [Appendix A-1]. A second hearing was held before the court. At the conclusion of the hearing, the Court entered a Memorandum and Order ruling that the Petitioners had violated the Consent Agreement. [Appendix B-1]. Petitioners did not file an Interlocutory Appeal from the Court's Memorandum and Order [Appendix B-1]. Nor did they file a Motion for Reconsideration of the Trial Court's Order.

While the litigation in Civil Action No. 90-CA9418 was pending, Petitioners filed a second civil action seeking class action certification; to set aside the Court's Order due to Fraud on the Court in violation of Rule 60(b)(3), Superior Court Rules; and for Declaratory Order declaring that the Court and the Respondent had violated the Free Exercise and Establishment

Clauses of the First Amendment, United States Constitution. Civil Action No. 90-CA9418 was designed to seek relief from the Order and Judgment entered by the Court on July 13, 1992 [Appendix C-1]. Petitioners filed a Motion for Reconsideration of the July 13, 1992, Order [Appendix C-1]. On February 25, 1993, the trial court denied Petitioners' Motion for Reconsideration. [Appendix C-1]. On March 4, 1993, Petitioners filed a Notice of Appeal to the District of Columbia Court of Appeals.

Without benefit of a Motion to Consolidate the two (2) pending civil actions, the Court in Civil Action No. 93-CA 05542, sua sponte, consolidated the two cases. Respondent filed a Motion to Dismiss the Complaint contending that the Complaint filed in Civil Action No. 93-CA05542 was barred under the doctrine of res judicata. Petitioners filed an Opposition to the Motion contending that the Second Action was separate and distinct from the first action. As such, the doctrine of res judicata did not apply. On June 23, 1993, the Court entered an Order granting Respondent's Motion to Dismiss. [Appendix D-1]. Petitioners filed a second Notice of Appeal to the District of Columbia Court of Appeals.

On Petitioners' Motion, the District of Columbia Court of Appeals entered an Order consolidating the two (2) civil actions.

On December 15, 1994, after hearing oral arguments, the District of Columbia Court of Appeals entered a Memorandum Opinion and Judgment in the Consolidated Appeals. The Court of Appeals reasoned that Petitioners' First Amendment Argument should have been raised in the first civil action which Petitioners themselves had initiated. The Court of Appeals ruled that both cases were properly dismissed. [Appendix E-1]. Petitioners filed a Motion for Rehearing and for Rehearing En Banc. On January 18, 1995, Court of Appeals denied the Petition for Rehearing. [Appendix J-1].

STATEMENT OF FACTS

The Petitioners are members of the Board of Deacons and the Board of Trustees of St. Phillips Baptist Church which is situated in the District of Columbia.

St. Phillips Baptist Church was incorporated under the laws of the District of Columbia in September, 1933. On September 16, 1974, the Church adopted and approved a set of Revised By-Laws. [Appendix F-1]. Under Article II of the Revised By-Laws, the governing body of the Church was declared to be the Joint Board, consisting of the Board of Deacons and the Board of Trustees, in joint session, and assembled. The Joint Board may hire, upon recommendation of an appointed committee, a Pastor. [Appendix F-1, Article I, Sec. I]. When a complaint against the Pastor is brought by the Joint Board charging the Pastor with misconduct, malfeasance, or misfeasance in office, the Board may prepare and serve a Complaint, consisting of specifications and charges, on the Pastor. The Pastor is granted 30 days within which to reply. In the event the Pastor should fail to respond to the specifications and charges in the Complaint, the Joint Board may, after due notice, consider the failure to be a waiver and declare the pulpit temporarily vacant, suspend the pastor's salary and proceed with the established methods of removal. In the event the Pastor shall deny the allegations, the Joint Board may designate a day and time for a full hearing before the Joint Board. If the Joint Board, after hearing, determines that the complaint has merits, It has the power to recommend the pastor's removal and present the recommendation to the church membership for approval or rejection. [Appendix F-1, Article I, Sec. II.]

On May 26, 1990, the Joint Board served a Complaint consisting of specifications and charges on the Respondent and informed him of the right to reply to the charges. [Appendix G-1]. While the charges were pending, the Respondent called a special meeting of the church membership and presented for

vote, his version of a new Church Constitution, Rules, and Regulation which Respondent claims to have been revised, approved, and adopted on June 13, 1990. [Appendix H-1]. By virtue of the revised Constitution, drafted by Respondent, Petitioners were automatically removed as members of the Board of Deacons and the Board of Trustees [the Joint Board]. Under the revised Constitution, Trustees would be recommended by the Pastor and approved by the church body. If approved, Trustees were to serve a term of office for four (4) years. [Appendix H-1, Art. VI, Sec. 3] Under the revised Constitution, the Pastor, once elected, shall serve until the relationship is terminated by mutual consent, death, retirement, by his resignation, or when the pulpit is declared vacant by vote of 3/4 (75%) of the members present and voting in a meeting specially called for that purpose. [Appendix H-1, Art. VI, Sec. 1]. It is because of Respondent's usurpation of power in removing the Petitioners, who were legally members of the Board of Deacons and the Board of Trustees, that caused the filing of the initial complaint on August 16, 1990. [Appendix I-1].

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE INVOLVING THE PROHIBITION AGAINST CIVIL COURTS BECOMING UNNECESSARILY ENTANGLED IN DISPUTES BETWEEN RELIGIOUS INSTITUTIONS AND THEIR PASTORS

This court has consistently held that civil courts are constitutionally impermissible forums for the adjudication, or resolution of ecclesiastical disputes. *Serbian Eastern Orthodox Diocese v. Milivojevich ("Serbian")*, 426 U.S. 696, 710, 96 S. Ct. 2372 (1976); *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449, 89 S. Ct. 601 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*,

344 U.S. 94, 116, 73 S. Ct. 143, 154 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S.1, 50 S. Ct. 5 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 666 (1871). Civil courts may not interfere in matters of church government, as well as matters of faith and doctrine. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church supra.*

Some federal courts throughout the circuits have held that ecclesiastical decisions are generally beyond the jurisdiction of secular courts. *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F. 2d. 1164, 1167 (4th Cir.1985), *cert. denied*, 478 U.S. 1020, 106 S. Ct. 3333 (1986). Indeed, as this Court pronounced in *Serbian Eastern Orthodox Diocese v. Milivojevich, supra,:*

> "Civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchial polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." At page 2382.

The right to choose a minister without judicial intervention:

> "underlies the well being of religious communities, for perpetuation of a church's existence may depend upon whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and the world at large." *Rayburn v. General Conf. of Seventh-Day Adventists, supra,* at 1167-68.

Any attempt by the civil courts to limit the church's choice of its religious representatives would constitute an impermissible burden on the church's First Amendment rights. *Rayburn v. General Conf. of Seventh-Day Adventists*, supra; *Kaufman v. Sheehan*, 707 F. 2d 355, 358 (8th Cir., 1983); *McClure v. Salvation Army*, 460 F. 2d 553, 560 (6th Cir., 1972). Disputes concerning the employment or status of pastors are inherently

ecclesiastical, and therefore cannot constitutionally be the subject of civil court review. *Hutchison v. Thomas*, 789 F. 2d 392 (6th Cir., 1986), *cert. denied*, 107 S. Ct. 277 (1986); *Simpson v. Wells Lamont Corporation,* 494 F. 2d 490 (5th Cir., 1974); *Knuth v. Lutheran Church Missouri Synod,* 643 F. Supp. 444 (D. Kan., 1986).

In *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, (1929), this Court held that when church law empowers certain "church authorities to determine....the essential qualifications of [clergy] and who possess them [,]" the decisions of such authorities, "although affecting civil rights, are accepted in litigation before the secular courts as conclusive...." 280 U.S. at 16. This rule of deference to a church's ecclesiastical decisions was predicated on a rationale first articulated by this Court in *Watson v. Jones, supra. Watson, supra,* is very similar to the case at bar. *Watson, supra,* involved a dispute by two rival factions over control of a Presbyterian church. The pending case involves two rival factions over control of St. Phillips Baptist Church. In *Watson, supra,* this Court delineated the outer boundaries of church-civil court entanglement. In *Watson, supra,* this Court stated as follows:

> "Whenever....questions of discipline or faith, or ecclesiastical rule, custom or law have been decided by the highest of these church [bodies] to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." 80 U.S. at 676.

The Court predicated the rule in *Watson, supra,* primarily on the "broad and sound view of the relations of church and state under our system of laws"__ namely, that church and state are separate.

II.

CIVIL COURTS SHOULD DECLINE SUBJECT-MATTER JURISDICTION, SUA SPONTE, IN CASES WHERE THERE EXIST A DISPUTE BETWEEN A CHURCH AND ITS PASTOR. OR, IN THE VERY LEAST, CIVIL COURTS SHOULD ABSTAIN FROM BECOMING EMBROILED AND UNNECESSARILY ENTANGLED IN DISPUTES WHICH NECESSARILY INVOLVED INTERPRETATION OF RELIGIOUS DOCTRINE

In substantial measure, St. Phillips Baptist Church adopts the religious doctrines set forth in *Hiscox's Principles and Practices for Baptist Churches. Hiscox*, [as the Treatise is commonly referred to], spells-out the Religious Doctrines espoused by Baptist Churches, world-wide. Matters of church governance are inextricably entwined in religious doctrine. The by-laws of St. Phillips are likewise inextricably entwined with *Hiscox.*

This case, bearing an issue of first impression, calls upon this Court to examine, and pronounce, a threshold duty on civil courts to decline subject matter jurisdiction, or abstain from exercising jurisdiction in similar cases. This issue, seemingly, was a foundational issue in the District of Columbia Court of Appeals. That Court noted that it was the Petitioners who had initiated the legal dispute. But Petitioner, being members of the Joint Board of Trustees and Deacons, possessed sole standing to seek rectification of their power to act as distinct from whether their act in removing Respondent was right or wrong. Some state courts have permitted adjudication of conflicts between church and clergy when the issue has been whether church officials had authority to effect a pastor's discharge, as distinct from whether the church's decision was correct. *Vincent v. Raglin,* 114 Mich. App-. 242, 318 N.W. 2d 629, 631 (1982); *Stony Island Church of Christ v. Stephens*, 54 Ill. App. 3d 662,

369 N.E. 2d 1313 (1977); *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 422 N.E. 2d 1337 (1981); *Holt v. Trone*, 341 Mich. 169, 67 N.W. 2d 125 (1954).

In the pending case, the Trial Court exceeded the outer boundaries restricting unnecessary entanglement in the religious affairs of St. Phillips Baptist Church. The appointment of a Moderator to supervise an ill-fated election, signing a Consent Agreement submitted by the parties, and the taking of testimony during a motion for contempt to determine whether Petitioners or the Respondent had violated the Consent Decree were all badges of unnecessary entanglement, simply because that entanglement required some degree of on-going supervision over church affairs.

The issue raised then, is whether or not the exercise of jurisdiction by the Court posed a significant risk of violating the First Amendment. The test was spelled out by this Court in the case of *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979). To be sure, where jurisdiction is exercised, as this Court stated in *Catholic Bishop, supra;*

> "It is not only the conclusions that may be reached by the [Board] which may impinge [on] rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502.

But in order to determine whether civil court intrusion in conflicts between the Church and its Pastor poses a "significant risk" of First Amendment violation, a court must determine whether or not court supervision would be ongoing and therefore prohibited, or whether or not court supervision is simply pervasive. *EEOC v. Pacific Pub. Assoc..*, 676 F. 2d 1272, 1282 (9th Cir., 1982). Or, stating the issue in another frame of reference, whether there is a potential for ongoing entanglement by virtue of court supervision over the affairs of a religious institution. Inquiry is one thing. Pretext is yet another. The trial

court issued a lengthy Memorandum and Order in the dispute between Petitioners and the Respondent, citing detail by detail of matters which transpired at a Church meeting conducted by a Monitor appointed by the Court to conduct an election.

Ultimately, this Court should determine whether the lower courts' pretext inquiry traversed questions as to the validity of the parties' religious beliefs and practices without choosing those parties' competing religious visions and practices, thereby avoiding violation of a significant risk of First Amendment entanglement.

III.

THE FILING OF A CIVIL ACTION BY PETITIONERS DID NOT CONSTITUTE WAIVER OF THE IMMUNITY TO WHICH THEY WERE ENTITLED AS OFFICIAL SPOKESPERSONS FOR THE CHURCH

A second reason why the trial court should have declined subject matter jurisdiction, or abstained, is couched in the immunity doctrine. Petitioners, having filed their complaint seeking limited determination as to whether they, as Trustees and Deacons [acting as a Joint Board], had authority to remove the Respondent. That issue was the sole issue before the Court. Having elongated the issue to an ongoing supervisory role, the immunity which Petitioners enjoyed was irretrievably lost. Clearly, Petitioners' claims fell within the scope of that immunity. *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F. 2d 260, 263 (4th Cir., 1988, quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos,* 107 S. Ct. 2862 (1987). The Court in *Forest Hills Early Learning Center, Inc., supra,* reasoned that the right of an established church to avoid "significant burden" of being "forc[ed]...to defend its beliefs and practices in extended free exercise litigation before a judge [who may] not understand its religious tenets and sense of mission places Petitioners' claims

squarely within the scope of that immunity. In other words, Petitioners rights fall within the category of rights that can be enjoyed only if vindicated prior to trial, *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982). It does not matter whether Petitioners initiated the litigation. The trial court had before it three options, namely; (a) the court could have declined to exercise subject matter jurisdiction, or (b) the court could have abstained from exercising jurisdiction, or (c) the court could have, and should have, limited its inquiry to the issue - whether Petitioners, as Members of the Joint Board [Board of Deacons and Board of Trustees] possessed authority to effect the Respondent's discharge as Pastor of St. Phillips Baptist Church.

The Courts throughout the Federal Circuits, and the Supreme Courts of the several states, are hopeless in disagreement as whether civil courts may adjudicate disputes between a church, represented by members of the board of Trustees, and the clergy relating to the clergy's tenure of employment. Some courts have held that when an employee, who challenges an employment decision, is a member of the clergy, even a limited inquiry into the pretext, or motive, for the termination is sharply limited. *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, 929 F. 2d 360, 363, (8th Cir., 1991); *Burgess v. Rockcreek Baptist Church*, 734 F. Supp. 30 (D.D.C., 1990); *Williams v. Mount Jezreel Baptist Church*, 589 A. 2d 901 (App. D.C., 1981).

The progression of decisions enunciated by this Court has clearly enunciated the "danger zones" of First Amendment entanglement. In *Everson v. Board of Education*, 330 U.S. 1 (1947), this court held that neither a State nor the Federal Goverment can participate in the affairs of any religious organization.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this court announced a three-pronged test in order to determine whether the doctrine of separation between church and state has been

violated. First: a court must inquire as to whether government action has a secular purpose; Second: a court must inquire whether that action neither advanced or inhibited religion; Third: there must not be unnecessary or excessive entanglement by the government into religion. *See also, Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S.____ (dec. June 7, 1993). This Court has held further that even Municipal Ordinances which prohibit the free exercise of religion are unconstitutional, *City of Hialeah, Dade County v. Lukumi Babuiaye*, 508 U.S._____(1993).

IV.

THE FILING OF A CIVIL ACTION IN A CIVIL COURT BY MEMBERS OF THE BOARD OF TRUSTEES AND THE BOARD OF DEACONS AGAINST A PASTOR OF A RELIGIOUS INSTITUTION DOES NOT CONSTITUTE A WAIVER OF CONSTITUTIONAL IMMUNITY PROTECTING A CHURCH'S PRACTICES FROM JUDICIAL SCRUTINY.

The decision by the District of Columbia Court of Appeals in the pending case is in conflict with prior decisions. In *United Methodist Church, Baltimore Annual Conference v. White*, 571 A. 2d 790 (App. D.C., 1990) the Court addressed a similar issue, but in reversed fashion. In *United Methodist Church, etc. v. White, supra*, the court stated:

> "Courts have, so far as we have found, unanimously recognized that such claims [disputes between a church and Its Pastor] involve matters of church governance and are not purely secular matters, and in the absence of church invocation of the civil courts, resolution of such disputes is properly before church officials."
> [citations omitted], 571 A. 2d at page 796.

In the very same Opinion, however, the Court defined the limited scope of civil court inquiry.

In *White*, *supra*, however, the District of Columbia Court of Appeals refined even those disputes when the Church has invoked the aid of a civil court. In *United Methodist Church, etc. v. White*, *supra*, the Court recognized that:

> "***** In limited circumstances, courts have adjudicated conflicts between church and clergy when the issue has been whether church officials had the authority to effect a pastor's discharge, as distinct from whether the church's decision was correct." [*Citing*, *Vincent v. Raglin*, 114 Mich. App. 242, 318 N.W. 2d 629, 631 (1982); *Stony Island Church of Christ v. Stephens*, 54 Ill. Dec. 299, 369 N.W. 2d 1313 (1977); *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 422 N.E. 2d 1337 (1981); *Holt v. Trone*, 341 Mich. 169, 67 N.W. 2d 125 (1954); *Tate v. Walker Memorial Baptist Church*, 282 A.D. 675, 122 N.Y.S. 2d 182 (1953); *Walker Memorial Baptist Church v. Saunders*, 285 N.Y. 462, 35 N.E. 2d 42 (1941). 571 A. 2d at page 793.]

The issue therefore is whether church officials may seek a partial adjudication of a dispute between the church and Its Pastor in a civil court. Once having invoked the jurisdiction of a civil court, a civil court's inquiry is limited to determine whether church officials had the authority to effect a pastor's discharge, an issue which is separate and distinct from the issue relating to the rightness or wrongness of church official's actions.

In the pending case, the civil court went beyond the mark which prohibits excessive entanglement. The court sanctioned a Consent Agreement by affixing the court's signature; the court appointed a Monitor to oversee a church election relating to Its revised constitution. The court's inquiry should have been limited to whether or not the Joint Board [Board of Deacons and

Board of Trustees] had authority to effect the Respondent's discharge in the first instance, nothing more.

CONCLUSION

In view of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Court of Appeals.

Respectfully Submitted,

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728 Dahlia Street, N.W.
Washington, D.C. 20012
(202) 393-3900
Attorney for Petitioners

Dated: April 18, 1995

APPENDIX A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DEACON CALVIN BUSSEY, *et al*

Plaintiffs,

v.

REVEREND ANDRE H. OWENS,

Defendant.

Civil Action No. 9418-90
(Judge In-Chambers)

CONSENT AGREEMENT

This matter came on for hearing upon the Plaintiffs' Motion for a Temporary Restraining Order, and defendant's opposition thereto. After presentation of evidence and testimony the parties consented to the following proposal, suggested by the Court:

FIRST: That the Church Members are the ruling authority in this Baptist Congregation, known as St. Phillips Baptist Church, Inc.

SECOND: That there now exist two documents governing the Church entity, the By-Laws adopted in 1976 and a Constitution, ratified in May, 1990.

THIRD: That pending a church conference meeting, scheduled for September 19, 1990, at 8:00 p.m., the Joint-Board shall continue in office and perform the duties as before May 30, 1990. That the Trustees, Deacons and other Officers shall similarly continue in office; any notices or letters to the contrary are hereby suspended.

FOURTH: That persons who have been elected to the Office of Deacon or Trustee or other position since May 30, 1990, shall also continue to serve in these positions.

FIFTH: That all Deacons, Trustees or other Officers, either elected pursuant to the 1976 By-Laws or the May 30, 1990,Constitution shall work together for the benefit and unity of the church congregation until the September 19, 1990, meeting.

SIXTH: That at least two weeks prior to September 19, 1990, notices shall be sent by regular mail to advise of the September 19, 1990, meeting to all church members. Attached to each notice shall be a copy of the 1976 By-Laws and the Constitution of May, 1990, and a copy of the Consent Agreement.

SEVEN: That a neutral person shall be selected by each side to speak at the September 19, 1990, meeting on behalf of the positions espoused by the Joint Board and Rev. Andre Owens.

EIGHTH: That Rev. Dr. Leamon White has been selected to serve as moderator for said meeting and to answer questions which may arise.

NINTH: That the question to be presented to the church meeting on September 19, 1990, is whether the church membership should be governed by the 1976 By-Laws or the May 30, 1990, Constitution, or whether a committee from the church body should be selected to study the matter and propose a new and different document for the governance of St. Phillips Baptist Church, Inc. A vote on each proposal shall be conducted by secret ballot.

TENTH: At communion services, until September 19, 1990, Deacon Calvin A. Bussey, and the newly elected Deacon, along with the other Deacons, shall assist with the passing and the serving of the sacraments.

/s/ Zinora M. Mitchell- Rankin
Zinora M.Mitchell-Rankin
Associate Judge

/s/ Downey J. Roundtree,
Patricia Ricks
Downey J. Roundtree,
Patricia Ricks
Co-Counsel for Plaintiff

/s/ James T. Wright
James. T. Wright
Counsel for Defendant

APPENDIX B

SUPERIOR COURT OF THE DISTRICT Of COLUMBIA
CIVIL DIVISION

DEACON CALVIN BUSSEY, *et al.*,

Plaintiffs,

v.

REVEREND ANDRE H. OWENS,

Defendant.

Civil Action No. 9418-90:
Appeal No. 91-259

MEMORANDUM OPINION AND ORDER

This matter is before this Court on the Defendant's and the Plaintiffs' respective Motion(s) To Enforce The Consent Agreement ("Agreement"). Upon consideration of the subject motions; plaintiffs' opposition to the defendant's motion; and the record herein, the court concludes that the defendant has demonstrated by a preponderance of the evidence that Calvin Bussey and Earl G. Jones, the plaintiffs herein, have engaged in conduct which violates the Consent Agreement dated August 28, 1990, for the following reasons:

1. The August 28, 1990, Consent Agreement required the parties to abide by the election results as determined by the September, 1990, election.

2. The September 19, 1990, election occurred as required by the Agreement, yielding the following results:

> Proposal #1 - Whether the Church should be guided by the By-Laws - 8 votes. (Position asserted by the plaintiffs herein).

Proposal #2 - Whether the Church should be governed by the new Constitution adopted in June 1990 - 86 votes. (Position asserted by the defendant herein).

Proposal #3 - Whether a Committee should be formed to establish a new Constitution or By-Laws to govern St. Phillips Baptist Church - 78 votes.

3. Proposal #1, which provided that the By-Laws would be the governing document was defeated as determined by the results of the September 19, 1990 election.

4. Proposal #2, which provided that the Constitution would be the governing document for St. Phillips Baptist Church, was approved and designated as the governing document by a majority of the voting congregation, during the election.

5. Pursuant to the Constitution, new Deacons and Trustee; were elected.

6. Plaintiffs, Calvin Bussey and Earl Jones, were not elected as a Deacon and Trustee, respectively, under the new Constitution.

7. Calvin Bussey and Earl G. Jones have refused to relinquish their respective positions in the Church.

8. Plaintiff, Calvin Bussey, has continued to sit on the front pew during worship services despite repeated requests not to do so. The front pew is the designated place for duly appointed ind authorized Deacons.

9. Plaintiff, Earl Jones, has refused to turn over the check register, bank statements and other records pertaining to the purchase of the lot which is adjacent to the Church.

10. Plaintiffs Bussey and Jones caused to be sent a letter, dated January 31, 1991, to the member of the congregation which called for a church meeting and provided "[r]egardless of what comes from the pulpit or Pastor, church business will be conducted." That plaintiffs, Bussey and Jones, have no authority

under the current governing Constitution and governing body to call for or to such a meeting at St. Phillips Baptist Church. (Defendant's Exhibit #1).

11. Plaintiffs, Bussey and Jones, participated in all Court hearings and meetings with the Court and understood that the expressed purpose of the Consent Agreement was to provide the competing factions an opportunity to present their respective positions to the congregation of St. Phillips Baptist Church and to allow the congregation, and not the parties in this case, to decide by which governing document, i.e. the 1976 By-Laws or the Constitution, if either one, they chose to be governed. That the congregation, by a majority vote on September 19, 1990 made that decision.

12. The above-referenced conduct of plaintiffs Bussey and Jones has resulted in the continuation of tensions within the Church and further has frustrated the objective, spirit and intent of the Consent Agreement.

13. The plaintiffs have not demonstrated, by the weight of the evidence, that the election held on September 19, 1990, was in any way irregular.

15. The defendant has demonstrated by a preponderance of the evidence that plaintiffs, Calvin Bussey and Earl Jones, have breached the Consent Agreement.

I. Factual Context[1] and Procedural History

The facts of this case reveal a very unfortunate story of a tense power struggle between the older guard and the new; a struggle between notions of the way things have been done for years in the Church and new initiatives.

St. Phillips Baptist Church was incorporated in the District of Columbia in September 1933. The Church has a membership of three hundred, seventy-five (375) persons with two hundred (200) persons in regular attendance. During a church business meeting in 1987, it was determined that thirty-one (31) members would constitute a quorum necessary to conduct business.

The plaintiffs herein [2] were elected as Deacons and Trustees, pursuant to the By-Laws which were enacted in 1974 and amended in 1976. Plaintiff Calvin Bussey has been an active member of the Church since 1955 and plaintiff Earl Jones has also been a member in good standing since 1957. Reverend Andre H. Owens, the defendant herein, became the Senior Minister at St. Phillips Baptist Church in January 1978.

Almost from the inception of Reverend Owens' ministry at St. Phillips, there were conflicts between himself and the Joint Board, the then governing body, which primarily consisted of the plaintiffs herein. Reverend Owens believed that the then governing body and the By-laws, as amended, severely limited his ability to propose and to implement new initiatives, such as a men's group.

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[1] The facts were derived from the record of the August 27-28, 1990, hearings; the pleadings, exhibits, motions and oppositions which comprise the official court file and the record of the May 21, 1991, hearing.

[2] The plaintiffs are Deacon Calvin Bussey, Ernest Avery, Calvin Turner, Bobbye Sears, James Branch and Trustees Earl G. Jones, Judy Davis, Floyd Grayson, Wilbert Jones and Willie Foster. Plaintiffs Bussey, Jones and Avery were the only three plaintiffs named by the defendant as having violated the Consent Agreement.

This conflict percolated for approximately twelve (12) years before the boiling point, as reflected by the initiation of the instant action, was reached by the parties.

On May 26, 1990, at a regularly scheduled business meeting, Reverend Owens presented to the members a document entitled "Constitution". The Joint Board, complained to Reverend Owens that he had not followed the proper procedure for presenting a new governing document to the congregation since he had not submitted the Constitution to the Joint Board for its approval. According to the plaintiffs, the Constitution could be presented to the congregation only if the Joint Board approved it and recommended to the congregation that it be adopted.

In response to Reverend Owens' action, the Joint Board called a special meeting to consider charges that Owens was guilty of improper conduct. Ninety-five (95) members of the congregation voted to retain Reverend Owens and to dismiss the charges, and sixty-three (63) members voted to discharge him.

At a subsequent Church meeting, initiated by Reverend Owens and disapproved by the Joint Board, the new Constitution was presented for approval to the thirty seven (37) members of the congregation who were present. Thirty-four (34) members voted to adopt the new Constitution and three (3) members of the congregation voted against the adoption of the Constitution.

The new Constitution repealed the By-Laws and required new elections for the Deacon and Trustee Boards. By letter dated June 23, 1990, Reverend Owens requested that the Joint Board, plaintiffs herein, advise him in writing, by July 16, 1990, whether they wished to continue to serve in their respective capacities.

The plaintiffs received this letter but did not respond because they believed the Pastor's actions to be contrary to the dictates of the By-Laws.

In a special meeting held on Wednesday, August 1, 1990, new Deacons and Trustees were elected. Reverend Owens advised the former members of the Joint Board of the election results, by letter, dated August 2, 1990, wherein he advised them that their services were no longer required.

These actions by Reverend Owens led the plaintiffs to file, on August 16, 1990, a Complaint for Injunctive Relief to restrain Reverend Owens from acting under the new Constitution.

After a lengthy hearing, on August 27 and 28, 1990, and extended discussions between the parties, their respective counsel, and the Court the parties entered into a Consent Agreement which was subsequently approved by the Court.[3] Each of the plaintiffs, including Calvin Bussey and Earl Jones, and the defendant, Reverend Owens, were present throughout all proceedings and discussions.

As a result of these extended discussions and negotiations, all parties agreed that the church congregation should be the entity to determine which governing document, i.e. the By-Laws, the Constitution or a new document, which would be developed by a duly elected committee, would govern the Church. All parties agreed to abide by the results of the election, which was scheduled for September 19, 1990. Pursuant to the Agreement, the parties further selected a neutral person to serve as a Moderator for the September 19, 1990, meeting. The Reverend Dr. Leamon White was selected by the parties and approved by the Court.

The parties were to provide written notice to the congregation of the date of the election and its purpose, at least two (2) weeks prior to the election, and were to provide them with a copy of the revised By-Laws, the new Constitution and the Consent Agreement. The parties were then to select a neutral

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[3] The plaintiffs were represented at that time by Dovey J. Roundtree, Esquire, and Patricia Ricks, Esquire. Ms. Roundtree withdrew as counsel by praecipe filed on February 4, 1991.

person to advocate their respective positions at the meeting. The parties agreed that the Joint Board and the newly elected Deacons and Trustees were to "work together for the benefit and unity of the Church congregation until the September 19, 1990, meeting." (Consent Agreement at page 2). On September 19, 1990, the election was held as scheduled.

The procedures described below were followed during the election. The moderator, Reverend Dr. White, called the meeting to order. Ms. Dovey Roundtree, the plaintiffs' attorney at that time, read the Consent Agreement and it was accepted by those present for inclusion in the record. The Church Clerk, Ms. Marjorie Carter Jones, gave a statement of the reasons for the meeting.

The plaintiffs and the defendant had previously designated speakers to address the membership in support of each of the proposed governing documents. The Moderator limited each side to a specified period in which to address the membership. The Church Clerk kept the time. Ms. Alice Green was selected to speak on behalf of the By-Laws and Mr. Byson was selected to speak on behalf of the Constitution. The specific time limits given are unclear in the record. Reverend Dr. White testified that he gave each side three (3) minutes, although his recollection, according to him, was unclear. Ms. Green testified that each side was given ten (10) minutes, although she testified that she was limited to seven (7) minutes and Mr. Byson was given longer than the ten (10) minutes allowed.

Next, the voters, who were eligible to vote, were certified. The Church Clerk called the names of the membership from the official Church roles. If the person was deemed eligible then that person was certified to vote in the election. To be eligible to vote the only requisite qualification is that the person so certified must be a member of the Church and thereby included on the Church roles. To be a member of the Church, the person must have received the right hand of fellowship. Therefore, children

who have received the right hand of fellowship are members of the Church and are, accordingly, eligible to vote. As such, plaintiff Bussey's grandson voted in the subject election. This process was continued until all persons present were declared either eligible or ineligible to vote. There were apparently a few persons present who were declared ineligible to vote although their numbers are not clear from the record.

After the certification was complete, the Moderator directed the ushers to close the doors, however, at least two (2) persons came in late and were certified to vote. The voting members were then divided into two (2) lines on the outside isles of the Church with a monitor assigned to each ballot box. The ballots were prepared by the Moderator and contained the three (3) proposals which were identified in the Consent Agreement. The ballots were secret and did not require the name of the voter. The moderator advised the voting members that they were to select only one (1) of the proposals on the ballot and that failure to comply with the instructions would invalidate that ballot. Each person was handed a ballot and in a single file proceeded to the ballot boxes which were located in the front of the sanctuary. The ballot monitors watched to insure that only one (1) ballot was placed in the ballot box by each voting member.

The Church Clerk then reviewed each ballot cast and tallied the results. She also brought to the attention of the Moderator five ballots which were invalid. Three (3) ballots were deemed invalid because they contained more than one (1) vote; two (2) persons attempted to vote who were not certified to vote, these ballots were also excluded from the tally. The Moderator placed the results on a board located in the front of the sanctuary, and then responded to concerns regarding the ineligible votes. The election yielded the following results:

Proposal #1 - Whether the Church should be governed by the 1976 By-Laws - 8 votes.

Proposal #2 - Whether the Church should be governed by the new Constitution - 86 votes.

Proposal #3 - Whether a Committee should be formed to establish a new Constitution or By-Laws to govern St. Phillips Baptist Church - 78 votes.

After the election results were posted, they were certified by a majority of the members present. According to Edward T. Hiscox, *Principles and Practices for Baptist Churches,* which the parties agreed would govern the election procedures, the voting majority controls. The majority of the members also voted to have the Moderator retain the election ballots, including the ineligible ballots. They were placed in storage at Mt. Bethel Church.[4]

As a result of the election, the new Constitution became effective and the new Board of Deacons and Trustees, as elected on August 1, 1990, assumed their respective positions.

Plaintiff Calvin Bussey, however, refused to relinquish his position and continued to sit on the front pew during worship services. The front pew is designated for duly elected Deacons. Plaintiff Bussey was asked not to sit on the front pew but has persisted in doing so since the September 1990 election. On November 14, 1990, a special Church meeting was held to discuss, among other matters, the conduct of Plaintiffs Bussey and Jones. A vote was taken concerning whether plaintiff Bussey would be allowed to continue to sit on the front pew. Of the members present, twenty-seven (27) voted to allow him to remain on the front pew, as a Deacon; thirty (30) voted against him being seated on the front pew and, nine (9) persons abstained. No action was taken at this meeting regarding plaintiff Earl Jones. Plaintiff Bussey was in attendance at this meeting.

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[4] The Court requested that Reverend Dr. White retrieve the ballot boxes from storage. Reverend Dr. White advised, that after a diligent search, the ballots could not be located.

Plaintiff Bussey, however, continued thereafter to sit on the front pew.

Plaintiff Earl Jones, as a Trustee and a member of the Joint Board, has been in charge of the Church's efforts to purchase Lot 17, which is adjacent to the Church. In that capacity, he maintained the bank books, Church records and other records pertaining to the purchase of Lot 17. Plaintiff Jones continues to hold himself out as a Trustee of the Church and to maintain the Church bank registers and records.

By letter dated January 21, 1991, plaintiffs Bussey and Jones, as signatories to the letter, called for a special meeting to be held at the Church on Saturday, February 2, 1991. This letter was sent to all Church members. Neither Reverend Owens nor any members of the current Board of Deacons or Trustees were consulted about this meeting or gave their approval in accordance with the governing procedures specified in the Constitution. The letter provided in pertinent part:

> [A] special call meeting will be held . . . for all members, business of vital importance. Regardless of what comes from the pulpit or Pastor, church business will be conducted. If you are concerned about the future of your church, please be present. [Defendant's Exhibit #1].

Prior to the meeting, plaintiff Ernest Avery, also a Deacon before the September 1990 election, met with Trustee James White, a newly elected Trustee, and demanded that the Church be made available for the February 2, 1991, meeting. Trustee White advised plaintiff Avery that the Church would not be made available and that there would be no meeting. Plaintiff Avery responded that there would indeed be a meeting.

The defendant filed a Motion for Contempt on February 1, 1991. Deacon Avery and Trustee Jones were served with the

motion on February 5, 1991, and Deacon Bussey was served on February 1, 1991.

This Court, by order dated February 13, 1991, denied defendant's Motion for Contempt.

Fourteen (14) days after the time had expired for filing a response to the defendant's motion, and after the Court's Order of February 13, 1991, the plaintiffs filed, on February 25, 1991, without a Motion for Leave to File, an Opposition to Defendant's Motion for Contempt and on April 8, 1991, filed a Motion to Extend the Time for Filing a Notice of Appeal and to Shorten the Time for Filing a Response. Upon consideration of the subject motions, this Court determined that an evidentiary hearing was appropriate. This matter, which was on appeal from the Court's earlier denial of defendant's motion for contempt, was remanded, at this Court's request, from the Court of Appeals. The evidentiary hearing was held on May 21, 1991.

All parties and respective counsel were present and called a number of witnesses at the May 21, 1991 hearing. Upon a closer review and clearer understanding of the record, this Court determined that the Consent Agreement was not an Order of this Court, and that its violation could not, therefore, implicate the Court's contempt powers. Accordingly, this Court denied the motion for contempt and invited the defendant to file a motion to enforce the Consent Agreement, and the plaintiffs to file an opposition. The parties complied with the Court's request.

The defendant contends that the plaintiffs, specifically Calvin Bussey, Earl Jones and Ernest Avery, have violated the Consent Agreement by refusing to accept the election results and by continuing to hold themselves out and acting as officers of the Church. Defendant further contends that the January 1991 letter and call for Church meeting, sponsored by these plaintiff and; plaintiff Avery's conduct in support and in furtherance of that meeting, and plaintiff Jones' refusal to turn over

Church documents demonstrates their noncompliance with the Consent Agreement.

The plaintiffs contend that the subject election was not in compliance with the Consent Agreement. Specifically, the plaintiffs allege that persons were improperly certified to vote; that plaintiffs' designated speaker was given less time to advocate their position than the defendant's designated speaker; that the Moderator announced that there one hundred and seventy-two (172) persons eligible to vote, the results of the election revealed that one hundred and seventy-two (172) persons voted, yet five (5) ballots were determined to be invalid; that the Moderator refused to answer questions regarding the election procedures, contrary to the requirements of the Agreement, and finally that children of tender years were allowed to vote. The plaintiffs further contend that as a result of these alleged irregularities the election was a nullity. The plaintiffs then implicitly argue, impossibility of performance; that they could not comply with the results of an improperly conducted election.

DISCUSSION

The clear objective of the Consent Agreement was to end the factious behavior between the parties and the consequent tensions within the congregation and, to allow the congregation, which the Church was created to serve, to determine which governing document it wished to be governed by. The parties before this Court fully understood these objectives. The parties further understood that, as a result of the election, there was the potential, if not the probability, that one (1) of the governing documents would be rejected by the congregation. Finally, the parties, with these objectives and understandings in mind, agreed to act in good faith and to abide by the outcome of the election.

This Court has been asked by the defendant to enforce the Agreement and to compel the plaintiffs to abide by the results

of the election. The plaintiffs, on the other hand, request that this Court find that the September 19, 1990, election is void and order a new election.

A. Election Procedures and Results

On February 25, 1991, the plaintiffs herein, raised for the first time, after the defendant's motion for contempt was filed on February 1, 1991, allegations of irregularities in the September 19, 1990, election procedures and results. At the congregation's request, Reverend Dr. White retained the election ballots, including the ineligible ballots, however, as of the date of the subject hearing, he could not locate these items in the storage area where they had been placed.

A presumption of regularity attaches to election procedures and election results. *See generally 26 Am. Jur. 2d., Elections,* §§ 322, 342-343 (1966). This is particularly so where, as here, the evidence of record, which consists of Reverend Dr. White's written report, his testimony and the testimony of the Church Clerk, Ms. Jones, provides prima facie evidence that the election procedures were fairly conducted and that the election results as certified expressed the will of the majority of the voters. Under these circumstances the burden of going forward with evidence of any irregularities in the election procedures and certified results rests upon these who contest it, the plaintiffs herein. *See United States, ex rel, Weightman v. Carberry,* 2 D.C. (2 Cranch) 358 (1822); *Webb, et. al v. Bowen, et. al.* 187 S.W. 461 (1916). The case of *National Federation of Ry Workers v. National Mediation Board,* 1 App. D.C. 266, 110 F. 2d 529, *cert. denied,* 310 U.S. 628 (1940), provides some illumination on the plaintiffs' evidentiary responsibility in that regard. That case involved, among other issues, a claim that the election procedures and results were fraudulent. Two rival unions, the National Federation of Railway Workers ('Federation') and the Brotherhood of Railway Carmen of America ('Brotherhood') sought to represent the African-American coach cleaners who were em-

ployed by the Texas Pacific Railway. The Brotherhood was certified, after an election, as the authorized representative of the workers. After several unsuccessful protests, the Federation filed an action for declaratory relief in the District Court. That Court dismissed the petition and the appeal followed. The Federation, the losing union, alleged that there were irregularities in the conduct of the election between the votes actually cast and the certified results; that the election results were, therefore, inaccurate, and that rather than losing the election that union had, in fact, won the election. In support of that contention, several affidavits and depositions were submitted at trial which purported to demonstrate that certain voters had in fact voted for the losing union. The Court of Appeals, in affirming the trial court's dismissal of the petition, observed:

> A charge that the certified result of the election was inaccurate because of mistake or fraud should insure a recount of the ballots, if properly preserved. Ballots are said to be the bet evidence for determining the outcome of an election and resort is had to them when an attempt is made, on proper grounds, to impeach the certified return of the election officials. Neither the affidavits attached to the complaint, nor the depositions introduced at trial were competent as evidence to impeach the ballots. Where no other evidence of fraud, irregularity, or illegality is introduced, the sworn statement of a voter concerning the nature of his vote is not competent evidence and should not be admitted to impeach the ballots. Any other rule would open the floodgates to 'second oath elections' conducted by the court with consequent loss of the freedom of choice associated with the secret ballot . . . (citations omitted) *Id.* at 535-537.

In the subject case the ballots, the best evidence, have been lost or misplaced, after having been placed in storage in September

1990, some nine (9) months ago as of the date of the hearing. While the defendant has not affirmatively pled the doctrine of laches or estoppel, the defendant would clearly be prejudiced, by the loss of this evidence, were this Court to find as credible the unsupported assertions of the plaintiffs that the procedures and results of the election were irregular. Certainly, the plaintiffs were aware of the facts which they now allege during and immediately following the election. Yet, for reasons which are undisclosed on the record, they waited four (4) months to raise these assertions and then only in response to defendant's motion for contempt.[5]

However, this Court's decision is not based on the loss of the best evidence, but upon the conclusion that the plaintiffs have utterly failed to provide any credible evidence which would call into question the validity of the election procedures and results, thereby necessitating a review of the ballots. The plaintiffs allege that more persons actually voted in the election that were officially certified to vote. They allege in that regard that this occurrence adversely impacted upon the fairness of the election and in some undisclosed way makes invalid the certified results of the election. The testimony provided by Reverend Dr. White and Ms. Jones revealed the following. One hundred and seventy-two (172) persons were certified to vote and one hundred and seventy-two (172) persons voted. Two (2) person who had not been certified to vote attempted to vote, and their votes were determined by the Church Clerk to be ineligible, and she so advised Reverend Dr. White. Three (3) ballots had more than one (1) vote on them, contrary to the specific instructions of

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[5] *See Grill Airborne Instruments Inc. v. Weinberger,* 694 F.2d 838, 843 (1982), (where the court in explaining the doctrine of laches observed the shorter the delay alleged the greater the showing of prejudice which is required. *See also Brundage v. United States,* 504 F.2d 1382, 1386 (Ct. Cl. 1974), *cert. denied,* 421 U.S. 998 (1975); *Concerned About Trident v. Schlesinger,* 400 F. Supp. 454, 478 (1975) (where Court observed that two kinds of prejudice may support a laches defense, where the delay has resulted in the loss of witnesses or evidence).

Reverend Dr. White. The Church Clerk advised him about these irregular ballots and those ballots were determined to be ineligible. A total of five (5) ballots were, for the reasons identified, determined to be ineligible. Reverend Dr. White further testified that at least two (2) persons were certified to vote after the initial certification. The presence of such persons would explain any discrepancies in the initial certification number and the number of votes cast, including the ineligible ballots. The collective testimony of Dr. White and Ms. Jones was substantially unchallenged by the plaintiffs. Moreover, the five (5) votes that were determined to be ineligible would not in any way alter the outcome of the vote, since the majority of the votes cast, would in any event, have resulted in the approval of the new Constitution.[6] Accordingly, this Court concludes that the plaintiffs have failed to present sufficient evidence to rebut the presumption of regularity which attaches to election procedures and the certified results. The certified results of the September 19, 1990 election, therefore, will not be disturbed.

B. Enforcement of Consent Agreement

In, *Principles and Practices for Baptist Churches*, *supra*, on page 144, Hiscox observes:

> The government is administered by the body acting together, where no one possesses a preeminence, but all enjoy an equality of rights; and in deciding matters of opinion, the *majority bears rules* [emphasis added].

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[6] The plaintiffs also assert that an undisclosed number of persons were improperly certified to vote. However, beyond the mere assertion, the record is devoid of any evidence as to who these persons were and why their certification was improper. The plaintiffs further assert that the election was unfair because their spokesperson was given less time to speak than the defendant's spokesperson. The record in this case does not support such a conclusion. Dr. White, although not recalling the specific amount of time allotted, testified that each proponent had equal time. The Church Clerk, Ms. Jones, who actually kept the time for each speaker did not testify differently.

The majority has spoken, through the case of secret ballots. The plaintiffs having agreed, by the execution of the Consent Agreement, to accept the mandate of the majority cannot now complain or act in a manner which frustrates the objectives and intent of the Consent Agreement. It is well settled that the Court may enforce Consent Agreements. *See King v. King,* 579 A.2d 659 (D.C. 1990); *Clark v. Clark,* 535 A.2d 872 (D.C. 1987). The plaintiffs argue that they cannot be held accountable for an act which the Agreement does not expressly require. This contention, however, fails for several reasons. First, the Agreement expressly provided that an election be held. It follows, therefore, by the exercise of logic that implicit in the requirement to hold an election is the further requirement that the results of the election, so held, would be adhered to by the parties. The evidence of record demonstrates that such a requirement was the clear intention of the parties. Moreover, implicit in every contract is the covenant of good faith and fair dealing,[7] and a violation of such a duty is properly treated as a breach of contract. By pursuing a course of conduct which is contrary to the express purpose of the Consent Agreement, the plaintiffs have clearly not acted in good faith. Finally, assuming, *argu-*

The congregation was provided with notice of the meeting, its purpose and the Consent Agreement two (2) weeks prior to the actual September 19, 1990, election and there is not evidence of record that the voting congregation did not understand the three (3) proposals from which they had to chose. Plaintiffs also assert irregularities in the election because a small number of children voted. The uncontroverted evidence of record demonstrates that every person who has received the right hand of fellowship, and is therefore a member of the Church, is eligible to vote. Indeed, the cited provision form Hiscox, which plaintiffs offered to support their contention that plaintiffs Bussey and Jones could independently call a meeting, (an interpretation which this Court does not share,) provides that 'the body acting together . . . all enjoy an equality of rights'. Therefore, all members, not just adult members are eligible to vote. Indeed, plaintiffs' assertion are interesting in that regard, since there was uncontroverted testimony that plaintiff Bussey's young grandson voted in the election.

[7] *See* Restatement (Second) of Contracts § 205 (Volume 8, 1979).

endo, that the express provisions of the Agreement have not been violated it is clear from the evidence of record that plaintiffs Calvin Bussey and Earl Jones have violated the spirit of the Agreement. Through their conduct, by refusing to relinquish their positions as officers of the Church and the rights and privileges appurtenant thereto, and by directing that correspondence be sent to the congregation and that a Church meeting be held, contrary to the dictates of the governing body, these plaintiffs have thwarted the dictates of the majority, the objectives of the Consent Agreement and, have fostered the very disharmony within the Church that the Agreement was designed to eliminate. The plaintiffs here cannot affirmatively ignore the outcome of the election simply because they do not like to result. Even if their assertions in this case had merit, which this Court has found they do not, the law would not countenance the kind of self help that these plaintiffs have engaged in. Where, as here, the spirit and the intent of the Agreement has been violated, this Court may provide legal redress. *See John B. Stetson Co. v. Stephen L. Stetson Co.,* 128 F.2d 981, 983 (2d. Cir. 1942); *Accord, McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 192-93 (1949). Accordingly, this Court concludes that the plaintiffs, Calvin Bussey and Earl G. Jones,[8] have violated the implied terms of the Consent Agreement as well as its spirit and intent. The Court further concludes, based upon the totality of the circumstances, and in the absence of an adequate legal remedy, that the defendant is entitled to the specific enforcement of the Agreement. *See Smith v. Taylor,* 65 App. D.C. 40, 43 (1935); Calamari and Perillo, *Contracts,* § 16.1-1 through §16.1-16 (3d ed. 1989).

The plaintiffs herein shall forthwith abide by the election results. Specifically, Calvin Bussey will no longer hold himself

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[8] This Court does not find that plaintiff Ernest Avery violated the Agreement since the only evidence presented concerning his conduct revealed that he approached Trustee White and demanded that the meeting, proposed by plantiffs Bussey and Jones, take place.

out as a Deacon of the Church and is, therefore, not entitled to any of the rights and privileges appurtenant thereto, such as sitting on the front pew of the Church, or directing that correspondence be sent to the congregation or that a Church meeting be held, without coordinating the request and any mailings with the appropriate officials in the Church. Similarly, Earl Jones will no longer hold himself out as a Trustee of said Church and is, therefore, not entitled to any of the rights and privileges appurtenant thereto, and must accordingly turn over to the Chairman of the Trustees Board all documents, bank registers and other such records which belong to the Church. Failure to comply with this Order forthwith will result, if noncompliance is demonstrated, in a find of contempt and the imposition of appropriate sanctions.

ORDER

For the foregoing reasons, it is this 26th day of July, 1991

ORDERED that defendant's motion to enforce the Consent Agreement is **GRANTED** and the plaintiffs are required to comply **FORTHWITH** in the manner specified herein; and it is further

ORDERED that the plaintiffs' motion to enforce the Consent Agreement and for a new election be and hereby is **DENIED**.

SO ORDERED.

/s/ Zinora M. Mitchell-Rankin
Zinora M. Mitchell-Rankin
Associate Judge
Signed in Chambers

Copies to:

Burton Penn, Esquire
Phillips & Penn.
1825 K Street, N.W.
Suite 718
Washington, D.C. 20006

James T. Wright, Esquire
805 Florida Avenue, N.W.
Washington, D.C. 20001

DOCKETED July 30, 1991
Mailed July 30, 1991

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DEACON CALVIN BUSSEY, *et al.*,

Plaintiffs,

v.

REVEREND ANDRE H. OWENS

Defendant.

Calendar 1
Judge Salzman
C.A. No. 90-9418

(July 13, 1992)

This action arose from a dispute between the plaintiffs, trustees and deacons of St. Phillips Baptist Church in Southeast Washington, D. C., and the defendant, Andre H. Owens, Pastor of the Church, over the conduct of Church business affairs. On August 28, 1990, the parties entered into a settlement agreement resolving their dispute. On June 20, 1991 and July 1, 1991, defendant and plaintiffs, respectively, moved to compel compliance with that settlement agreement. Construing the settlement agreement as a contract, the Honorable Zinora Mitchell-Rankin of this Court held an evidentiary hearing on the dispute and, on July 26, 1991, entered an order granting defendant's motion to enforce the Settlement Agreement and denying plaintiffs'. That order was accompanied by a detailed memorandum in which Judge Mitchell-Rankin explained the basis of the ruling. Plaintiffs neither appealed nor sought reconstitution, nor brought any other action respecting the July 26, 1991 order. Consequently, on March 3, 1992, the Clerk dismissed the action, pursuant to Civil Rule 41(a), for want of prosecution.

The matter is now before the Court on plaintiffs' motion of May 11, 1992, seeking to vacate the dismissal and to reinstate the complaint. Defendant opposes that relief, correctly noting that the case was settled by agreement almost two years ago and that the Court ordered the settlement agreement enforced almost a full year ago. Plaintiffs have proffered no basis for re-opening the judgment entered by Judge Mitchell-Rankin after a full hearing and on careful consideration of the competing arguments and claims.

In the circumstances, Plaintiffs' motion to vacate the dismissal is DENIED for want of good cause shown.

IT IS SO ORDERED

/s/ Richard S. Salzman
Richard S. Salzman
Superior Court Judge

Signed in Chambers

Copies to:
Judge Zinora Mitchell-Rankin

James T. Wright, Esquire
805 Florida Avenue, N. W.
Washington, D. C. 20001

Clement Theodore Cooper, Esquire
918 F Street, N. W.
Washington, D. C. 20004

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CALVIN BUSSEY, *et al.*,

Plaintiffs,

v.

Reverend ANDRE H. OWENS,

Defendant.

Civil Action No. 90-CA-9418
Calendar I
Judge Richter

ORDER
(February 25, 1993)

Before the Court is Plaintiffs' Motion for Relief from Order Dated July 13, 1992, Pursuant to Rule 60(b). On March 3, 1992, pursuant to Rule 41-I(a), the Clerk of the Court dismissed Plaintiffs' action for failure to prosecute. In his Order of July 13, 1992, Judge Salzman of this Court denied Plaintiffs' request for reinstatement of their action; it is from this Order that Plaintiffs seek relief. For the following reasons, the instant motion must be denied.

Plaintiff is seeking to reinstate an action that was settled by consent of two parties two and one-half years ago. On July 26, 1991, one and one-half years ago, and following a full evidentiary hearing on the matter, Plaintiffs were ordered by the Court to comply with the settlement agreement. Plaintiffs took no further action until May 11, 1992, when they moved to reinstate the action following its dismissal for want of prosecution. Citing the matter's history and Plaintiffs' failure to enumerate any grounds to support the requested relief, Judge Salzman denied Plaintiffs' motion.

Plaintiffs now seek relief from Judge Salzman's order. They blame their long delay in filing the motion on their not receiving Judge Salzman's order until January 7, 1993. Plaintiffs offer no reason whatsoever for waiting until January 7, 1993, to determine the status of their May 11, 1992, motion, and cite not one instance where they have made a diligent effort to learn whether Judge Salzman ruled before January 7, 1993. In the instant motion, Plaintiffs advance vague and wholly conclusory allegations of fraud on the Court, but proffer not one shred of evidence to support such a claim. In fact, Plaintiffs support their motion entirely on the proposition that Defendant had no authority to draft a new constitution. Pursuant to the Consent Agreement, this issue was fully debated and resolved, against the Plaintiff, by the vote of the Congregation of St. Phillips Baptist Church and the Order enforcing the Consent Agreement.*/ Once again, Plaintiffs have presented no reason for the Court to reopen this matter.

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*/ The parties agreed, in the Ninth Covenant of their Consent Agreement, to allow the Congregation of St. Phillips to decide their controversy. That body has spoken, and the Defendant emerged the victor.

WHEREFORE, upon consideration of the foregoing, it is this 25th day of February, 1993, hereby

ORDERED that Plaintiffs' Motion for Relief from Order Dated July 13, 1992, Pursuant to Rule 60(b), be, and herewith is, DENIED.

/s/ Robert I. Richter
JUDGE ROBERT I. RICHTER
Signed in Chambers

Clement Theodore Cooper, Esq.
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James T. Wright, Esq.
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DOCKETED MARCH 1, 1993
MAILED MARCH 2, 1993

APPENDIX D

IN THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DEACON CALVIN BUSSEY, *et al.*

Plaintiffs,

v.

REVEREND ANDRE E. OWENS

Defendant.

Civil Action Nos. 93-5542, 90-9418

Calendar No. 9
Judge Burgess

MEMORANDUM AND ORDER

This matter is before the Court on defendants' motion to dismiss and the plaintiff's response.

The Court agrees with the defendants that this action is barred by *res judicata.* The plaintiffs in this case were three of the plaintiffs in No. 90-9418. The defendant Owens here was the defendant in No. 90-9418. Count I of the complaint here alleges fraud on the Court in connection with the consent agreement enforced by Judge Rankin in No. 90-9418. In the motion for reconsideration of Judge Salzman's order, decided by Judge Richter, the plaintiffs alleged that "there is indeed an underlying question relative to the inequities of the voting process held which rose to the level of fraud upon the Court mentioned in Rule 60(b)(3)." The second count of the complaint, alleging violation of the First Amendment in the enforcement of the consent agreement, could have been raised in the prior litigation.

The doctrine of *res judicata* or claims preclusion bars relitigation of the same claim or any claim that might have been raised in the first proceeding, where the first proceeding was resolved by a valid final judgment on the merits and the parties are the same. *Washington Medical Center v. Holle,* 573 A.2d 1269, 1280-81 (D.C. 1990). The claims raised in this case either were raised or could have been raised in the motion before Judge Richter, as well as the ones before Judge Salzman and Judge Mitchell-Rankin. Thus, the claims here are barred. The fact that the plaintiffs try to make this a class action does not allow them to avoid operation of the doctrine of *res judicata*.

Accordingly, the Court ORDERS that the motion to dismiss be GRANTED.

/s/ A. Franklin Burgess, Jr.
A. Franklin Burgess, Jr.
Judge

SIGNED IN CHAMBERS
JUN 23 1993

DOCKETED JUNE 24, 1993
MAILED JUNE 25, 1993

APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS
Nos. 93-CV-313 & 93-CV-879

Calvin Bussey, *et al.*,

Appellant,

v.

Andre H. Owens,

Appellee.

Appeals from the Superior Court of the
District of Columbia
Civil Division
CA No. 5542-93

(Hon. Robert I. Richter, Trial Judge)
(Hon. A. Franklin Burgess, Jr., Trial Judge)

(Argued December 14, 1994 Decided December 15, 1994)

Before Schwelb and Farrell, *Associate Judges*, and Mack, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

Appellants Calvin Bussey, *et. al.* (collectively Bussey) appeal from adverse orders in two related cases involving two factions seeking control of a Baptist Church. The underlying facts and litigation history are set forth in the orders of four judges of the trial court, as follows:

Judges	Date of Order
Hon. Zinora M. Mitchell-Rankin	July 30, 1991 (Memorandum Opinion and Order)
Hon. Richard S. Salzman	July 13, 1992
Hon. Robert I. Richter	February 25, 1993
Hon. A. Franklin Burgess, Jr.	June 24, 1993

Substantially for the reasons stated in these orders, Bussey's contentions in the trial court were entirely lacking in merit.

In this court, Bussey argues primarily that by approving and enforcing a settlement agreement between the parties in the earlier case, the Superior Court acted as a forum for the review of ecclesiastical questions, in violation of the First Amendment. *See, e.g., United Methodist Church v. White,* 571 A.2d 790 (D.C. 1990). As Judge Burgess noted in his order of June 24, 1993, this contention was not timely made in the trial court. Even if we perceived any error — and we do not — such error was invited by Bussey, who consented to the agreement and failed to appeal from Judge Mitchell-Rankin's order enforcing it. *See, e.g., District of Columbia v. Wical Ltd. Partnership,* 630 A.2d 174, 182-83 (D.C. 1993). In any event, if the Superior Court was without authority under the Constitution to consider the questions raised in Bussey's complaints then those complaints were appropriately dismissed.

Affirmed.

FOR THE COURT

/s/ William H. Ng
William H. Ng
Clerk of the Court

Copies to:

Honorable Robert I. Richter

Honorable A. Franklin Burgess Jr.

Clerk, Superior Court

James T. Wright, Esquire
805 Florida Ave., NW
Washington, DC 20001

Clement Theodore Cooper, Esq.
P.O. Box 76135
Washington, DC 20013

APPENDIX F

REVISIONS OF BY-LAWS
Adopted and Approved - September 16, 1974
for the
ST. PHILLIPS BAPTIST CHURCH

ARTICLE I. - EXECUTIVE BRANCH

The pastor and assistant pastor are subject and responsible to the authority of the Board of Deacons and Board of Trustees in sessions assembled, hereinafter referred to as the Joint Board.

Section I - Hiring of Pastor

Whenever the church pulpit is vacant, the Joint Board shall appoint a committee to seek out a minister of the gospel to fill such vacancy, and upon the selection of a candidate deemed suitable by the appointed committee, the committee shall present such candidate to the Joint Board for its approval or rejection. Upon the approval of a candidate deemed suitable to the Joint Board the Joint Board shall invited the candidate to appear and speak to the body of the full church membership. The Joint Board may, if it deems advisable, recommend the candidate to the church membership for approval as pastor.

Section II - Removal of Pastor

The pastor elected by the church membership shall have no tenure of office, but shall serve at the pleasure of the church membership body.

A complaint against the pastor for misconduct, malfeasance, or misfeasance of his office may be initiated by any member of the church in good standing. Such complaint shall be presented to the Joint Board. Upon receipt of a complaint the Joint Board shall meet for consideration of the validity of the complaint. If the joint Board assembled, by a majority vote, deems the complaint has merit, it shall draft specifications of the complaint against the pastor and serve same upon him, either in

person before the Joint Board assembled, or by certified mail. Upon receipt of the specifications of the complaint, the pastor shall have 30 days in which to make a reply. If the pastor should refuse or fail to reply to the specifications after due notice within the specified time, the Joint Board shall consider his having waived his right to reply and declare the pulpit temporarily vacant, suspend the pastor's salary and proceed with the established methods of removal. If the pastor shall deny the allegations of the complaint, the Joint Board shall designate a day and time for a full hearing before the Joint Board. Upon the completion of the hearing, if the Joint Board is satisfied that the complaint is without merit, it shall so inform the pastor and dismiss the complaint. But, if the joint Board, by majority vote, deems the complaint has merit it shall recommend the pastor's removal and present its recommendation to the church membership for its approval or rejection.

ARTICLE II. - JOINT BOARD

Section I - Duties of the Joint Board

The Joint Board, consisting of the Board of Deacons and the Board of Trustees, in joint session assembled, shall be the governing body of the church. The Joint Board shall have all legislative authority to institute, approve and recommend to the church membership for adoption all rules and regulations (Guidelines) pertaining to all matters concerning the church. All church organizations and subordinate bodies of the church shall be subject to the authority of the Joint Board.

Section II - Trustee Board

The Board of Trustees shall have control of all financial policies of the church and all monies solicited, received, raised, or otherwise coming into the custody of all organizations of the church in the name of and for the general benefit of the church, shall be under the control of the Board of Trustees and accountable to it. All such funds shall be reported to the financial secretary of the church by the secretary of each organization having custody of such funds as soon as feasible. All such funds

are considered to be in the general treasury of the church, and no substantial expenditures may be charged against such funds without consent of the Board of Trustees.

The Board of Trustees shall authorize any expenditures it deems necessary for the general welfare of the church.

Section III - S1 Selection of Members of the Joint Boards

A candidate for membership to the Board of Deacon or Board of Trustees may be nominated by any member of the church, who is in good standing, by presenting the name of the nominee to the Joint Board for consideration. If the Joint Board by majority vote, deems the nominee acceptable, it shall present the nominee, along with its recommendations, to the church body for its approval.

ARTICLE III. - WHAT CONSTITUTES A MEMBER

Section I - Church Members

A member of the church is good standing shall be required to attend church regularly and contribute regularly to the financial need of the church; and shall likewise contribute to the spiritual and social welfare of the church and uphold the standards of conduct required of all members.

Any member who has not attended church nor contributed to its financial need for one (1) calendar year, without good cause shown, shall no longer be considered a member in good standing, and his or her name shall be removed from the church rolls.

ARTICLE IV. STANDARD OF CONDUCT FOR PASTOR, JOINT BOARD MEMBERS & CHURCH MEMBERS

Section I

Any action by the pastor, members of the Joint Board and members of the church family in general deemed by the Joint Board to be detrimental to the welfare of the church shall be

subject to the provisions of Section II, as pertains to the removal of the pastor. Any disorderly conduct - as cursing, fighting, or use of abusive language on, in or about the church edifice or adjoining property, whether or not directed toward any particular person, shall cause the offending member or person to be subject to this provision.

Section II

The pastor and members of the Joint Board shall assert every effort to resolve any differences that may arise between them in a spirit of christian fellowship. They shall at all times by willing to listen to the opinions of each other. If the pastor should be unwilling to do so and refuses to remain at a meeting of the Joint Board, the Joint Board may, in its discretion, declare the pulpit vacant and suspend the pastor's salary as heretofore provided.

Section III

Any civil action of a personal nature, whether initiated by the pastor against members of the Joint Board or members of the church body, or vice versa, shall first be brought to the church membership in a regular church meeting for consideration before resort to the Courts.

Section IV

The Chairman of the Deacons and Trustees shall chair all meetings of the Joint Board and of the church body. However, the chairman of these respective boards may designate a member of either board to act as chairman.

Section V

The Sergeant-At-Arms shall be designated by the chairman to maintain order, when it is deemed necessary, at any church meeting, and any person acting in a disorderly manner so as to interfere with the peaceful conduct of such meeting shall be ejected by the Sergeant-At-Arms. The Joint Board shall take

any action it deems necessary to maintain order at any such meeting even to the extent of call for the aid of the police.

Section VI

All officers of the church shall maintain the same standard of conduct as required by the pastor and membership, and they are subject to the same disciplinary action.

(Re-organized and reproduced October 11, 1976)

APPENDIX G

Exhibit 7
May 26, 1990

The Board of Deacons and Trustees known as the Joint Board of the St. Phillips Baptist Church in the majority hereby register the following complaints against Rev. Andre H. Owens, Pastor:

1. Failure to abide by the letter of call as agreed upon when accepting the position as pastor.
2. Failure to abide by the church approved By-Laws as agreed upon when accepting the position as pastor.
3. The attempting to usurp the authority of the superintendent duly elected by the church body disregarding the superintendent's planned program of classes, instructors and activities formulated by the superintendent and her staff of teachers by trying to impose a plan of the Sunday School activities.
4. Imposing his will on the membership by usurping the authority (by-passing) of the Joint Board with initiating changes in disregard for established church policies during the regular church morning worship services, without services, without the expressed wishes of the membership (Joint Board).
5. The symbolic act of tearing up the church approved By-Laws in a regular Sunday morning church worship service without regard for following the proper procedures as required by the church body and without dismissal of visitors.
6. The intentional act of deceiving the Deacons and Deaconess on Sunday, March 4, 1990, during morning worship services by prior approval and agreement with their selection of the guest speaker with no intention of honoring their prior agreement.

7. Disregard for the clearly understood agreement of the decision of the Joint Board assembled in regular scheduled session whereby he (the pastor) indicated that a letter of invitation had been sent to the agreed guest speaker and that speaker would deliver the message for that morning worship; however, during the service his agreement was broken and the result was his replacing the agreed guest speaker with his original choice of speaker.
8. Failure to remain at an official scheduled church business meeting in session.
9. Falsifying the church financial status in order to solicit funds from other churches under false pretense.
10. Interference of the music department causing discord with the music directors and causing many of them of leave.
11. Failure to initiate a vital outreach program mandated by the church body.
12. Usurping the authority of the Joint Board by initiating action on a picture directory without the express and/or implied approval of the Joint Board.
13. Willfully distributing self-written church constitution, rules and regulations for immediate vote before following proper procedures and specified guidelines wherefore causing emotional disturbances among the church membership in the regular scheduled church business meeting, including damaging church furniture (pulpit top) by one of the members during the excitement.
14. The soliciting of funds from the membership for services performed that is included in his letter of call.

APPENDIX H

Exhibit 8

St. Phillips Baptist Church
North Capitol and K Streets, N.E.
Washington, D.C. 20002

CHURCH CONSTITUTION, RULES AND REGULATIONS
(Revised, approved, and adopted on June 13, 1990)

ARTICLE I - NAME

The name of this Christian Church shall be the St. Phillips Baptist Church, located at 1001 North Capital Street, N.E., in the city of Washington, D.C.

ARTICLE II - MISSION

The mission of St. Phillips Baptist Church shall be the maintenance of Christian work and worship for the spiritual improvement of its members, the conversion of the lost and whatever contributes to the advancement of Christ's cause and His Kingdom in the world. The foundation for this mission is to be found in the Word of God as contained in the Holy Bible.

ARTICLE III - CHARACTER

Section 1 - Policy

The government of St. Phillips Baptist Church is vested in the body of believers who compose it. This church is not subject to the control of any other ecclesiastical body, but it recognizes and sustains the obligation of mutual counsel and cooperation which are common among Missionary Baptist Churches.

This church is not to invite secular courts to solve problems within the body. Problems are to be handled according to wholesome Christian practices established in the Word of God, the Holy Bible.

Section 2 - Doctrine

The doctrine of St. Phillips Baptist Church is based solely on the acceptance of the Holy Scriptures as its authority in matters of faith and practice. Its understanding of Christian truth as contained therein is in accord with the belief of the Christian Church, as interpreted by the Pastor.

ARTICLE IV - CHURCH COVENANT

Having been led, as we believe, by the Spirit of God, to receive the Lord Jesus Christ as our Savior, and on the profession of our faith, having been baptized in the name of the Father, and of the Son, and of the Holy Spirit, we do now, in the presence of God, and this assembly, most solemnly and joyfully enter into covenant with one another, as one body in Christ.

We engage, therefore, by the aid of the Holy Spirit, to walk together in Christian love, to strive for the advancement of this church, in knowledge, holiness and comfort; to promote its prosperity and spirituality; to sustain its worship, ordinances, discipline and doctrines; to contribute cheerfully and regularly to the support of the ministry, the expenses of the church, the relief of the poor, and the spread of the Gospel through all nations.

We also engage to maintain family and secret devotions; to religiously educate our children; to seek the salvation of our kindred and acquaintances; to walk circumspectly in the world; to be just in our dealings, faithful in our engagements, and exemplary in our deportment; to avoid all tattling, backbiting and excessive anger; to abstain from the sale and use of intoxicants for pleasure, and to be zealous in our efforts to advance the kingdom of our Savior.

We further engage to watch over one another in brotherly love; to remember each other in prayer; to aid each other in sickness and distress; to cultivate Christian sympathy in feeling, and courtesy in speech; to be slow to take offense, but always

ready for reconciliation, and mindful of the rules of our Savior to secure it without delay.

We moreover engage that when we remove from this place we will as soon as possible, unite with some other church, where we can carry out the spirit of this covenant and principles of God's Word.

ARTICLE V - MEMBERSHIP

Section 1 - Qualifications

The membership of the St. Phillips Baptist Church shall consist of such persons as confess Jesus Christ to be their Lord and Savior and who have been baptized by immersion upon the authority of a Christian Church. Such persons may present themselves for membership as candidates for baptism by immersion, by letter as a member in good and regular standing from another Baptist Church, by Christian Experience as a member from another Christian Church, or for reinstatement. When such persons present themselves for membership, they shall attend four (4) sessions of the New Members Class.

Section 2 - Duties

Members are expected to be faithful in all the commitments essential to the Christian life, to attend the services of the church, to give regularly and in proportion as the Lord blesses (1/10th plus) for its support and ministry, and to share in its organized work.

Section 3 - Rights

Only those members that are in good and regular standing (that is, attending and contributing consistently, except as prevented by sickness or job situation), and who do not hold letters of dismissal, may act and vote in the transaction of church business, may hold office in the general church organizational structure or any of the church auxiliaries.

Section 4 - Registration

Members shall annually register their names, current address and zip code, and home phone numbers with the Church Clerk. The duration of this registration period is three months, from January through March. Any members who fails to register within the designated time period shall be deleted from the St. Phillips Baptist Church active membership roll and shall be placed on the inactive roll.

Section 5 - Terminations

The continuance of membership shall be subject to the principles, guidelines, and customs contained in the Holy Bible, and especially as follows:

1) Any member in good and regular standing who desires a letter of dismissal and recommendation to another Christian church is entitled to have it granted upon request from the gaining church. Letters are not to be granted to individuals, but only to another Christian church which a member desires to join.

2) If a member in good and regular standing requests to be relieved from his covenant obligation to the St. Phillips Baptist Church for reasons which the church may determine to be justifiable after it shall have patiently and kindly endeavored to secure their continuance in the church fellowship, such requests shall be granted and membership terminated.

3) Should a member become offensive to the church and to its good name by reason of unchristian conduct (as based in the Holy Bible) or by persistent breach of his/her covenant commitment, the church may terminate their membership, but only after faithful efforts have been made to bring such member to repentance and amends.

4) All requests for termination of membership or action looking thereto shall first be considered by the Pastor and Deacons, who shall make recommendations to the church body.

ARTICLE VI - CHURCH OFFICERS

The officers of the St. Phillips Baptist Church shall be as follows:

Section 1 - Pastor

The Pastor will give himself to the ministry of the Word and the leadership of the congregation. He shall be the chief executive of the St. Phillips Baptist Church for all business activities. He shall be the Moderator of all meetings of the congregation for the transaction of business, shall have general supervision of the activities of the church, and shall be ex-officio member of all committees. He, or his designee, shall instruct all new members in the duties and privileges of membership. He shall supervise all staff members.

A Pastor is to be chosen and called by the church whenever a vacancy occurs. His election shall take place at a meeting called for that purpose. At least two (2) weeks public notice shall be given for meetings to fill a pulpit vacancy. When the church is without a pastor, a Pulpit Committee under the supervision of the Deacons shall seek a suitable Pastor. The findings of the Committee will be submitted to the Deacons, who shall bring their findings to the church congregation, considering not more than three (3) men for vote. A majority of those present and voting is needed to confirm a call. The Pastor, once elected, shall be notified in writing and shall serve until the relationship is terminated by mutual consent, death, retirement, by his resignation, or when the pulpit is declared vacant by vote of 3/4 (75%) of members present and voting in a meeting specially called for that purpose. The church will then give the Pastor four (4)

weeks notice with pay. A Pastor who wishes to resign shall give at least four (4) weeks notice to the church.

Section 2 - Deacons

The duties and qualifications of the Deacons shall be those prescribed by the New Testament of the Holy Bible. They shall be specifically charged with the administering of the Lord's Supper; assisting the Trustees in receiving the tithes and offerings of the membership; keeping the membership enlisted in the full program of the church; promoting peace, harmony, and the spirit of cooperation with the church leadership and the entire program of the church; and other duties as indicated under the direction of the Pastor as led by the Holy Spirit.

The Chairman of the Board of Deacons cannot serve as Chairman of the Pulpit Committee when the church is without a Pastor.

Each new chairman of the Board of Deacons shall serve not more than two (2) consecutive terms in the office. A term of office shall be four (4) years. All Deacons will serve at the desire of the church body with the approval of the Pastor. They must be reappointed to the Board annually by pastoral recommendation.

Section 3 - Trustees

The Trustees shall be recommended by the Pastor and approved by the church body and shall serve a term of office. A term of office shall by four (4) years. Trustees will be responsible for the physical affairs of the church and not as regular members of the Official Board. Consecutive terms of office is possible if reappointed by the Pastor and approved by the Church.

The Chairperson of the Trustees shall sign all checks along with the Treasurer or a Deacon. Two of the three signatures shall be deemed valid for all checks issued by the church. The

Pastor shall be knowledgeable of all checks written in the authority granted by the church; he shall not be a signator.

All Trustees shall be bonded if deemed necessary by the church. Any member who meets the qualifications can be a Trustee as the church congregation and Pastor designate.

Section 4 - Advisory Council

The St. Phillips Advisory Council shall consist of the Pastor and all auxiliary leaders. The Church Clerk or designee is a permanent member of this Council. This Council shall serve as a clearing-house for all business matters for the church and shall submit recommendations to the Official Board for consideration.

Section 5 - Official Board

The Pastor and Deacons shall compose the Official Board of St. Phillips Baptist Church. This Board shall meet regularly and shall meet prior to all regularly scheduled Church Business Meetings and other special meetings. The Official Board shall submit its recommendations to the church body for action.

ARTICLE VII - CHURCH STAFF

Section 1 - Clerk and Assistant Clerk

The Church Clerk shall be the official holder of the proceedings of the church meetings and shall keep a fair and intelligible record of all such meetings, duly inscribed in a permanent record. The Clerk shall keep a permanent record of the membership, issue letters of transfer and dismissal, notify persons excluded from fellowship of such actions. The Clerk shall perform other duties as may arise related to the execution of the office.

The Assistant Church Clerk shall render assistance to the Clerk as needed to perform related duties.

Section 2 - Secretary and Assistant Secretary

The Secretary is responsible to the Pastor for orderly record keeping and correspondence related to the official business of both the Pastor and the church. The Secretary shall be the recorder of the proceedings of the Official Board, the Advisory Council, and all Church Business Meetings, regular and special. The Secretary shall perform such other duties as deemed necessary for the successful execution of the office.

The Assistant Secretary shall render assistance to the Secretary as needed to perform related duties. The Assistant Secretary shall also be responsible for all issues related to the printing of the weekly and special worship bulletins of the church whenever needed.

Section 3 - Treasurer

The Treasurer shall receive all monies of the church from whatever sources derived. Unless otherwise directed by the Pastor, the Treasurer shall pay all salaries, bills, and other items provided for in the budget. All disbursements should be made promptly. the Treasurer shall sign or countersign all checks. A weekly report of the financial condition of the church shall be provided to the Pastor and the Deacons. The Treasurer shall work together with the Financial Secretary in providing tri-annual written reports to the church of all receipts and disbursements for the proceeding four (4) months. The Treasurer shall be bonded if deemed necessary by the church.

Section 4 - Financial Secretary

The Financial Secretary shall be responsible for maintaining an accurate ledger of all financial transactions of the church. The ledger should conform to sound financial management principles of accounting. The Financial Secretary shall work together with the Treasurer in providing tri-annual written reports to the church of all receipts and disbursements for the

preceding four (4) appropriate Tri-Annual Church Business Meetings with copies available to members present.

Section 5 - Assistant Pastor

The Assistant Pastor shall be an ordained Baptist minister, appointed by the Pastor to assist him, and approved by the church. He shall be responsible for all duties as assigned by the Pastor, and shall be responsible to represent the Pastor in his absence.

Should the Pastor die or resign, the Assistant pastor shall be subject to the Deacon Board during the search for a new Pastor. He cannot be a member of the Pulpit Committee. Upon selection of a new Pastor, this position shall become vacant.

Section 6 - Minister of Education

The Minister of Education shall be an ordained Baptist minister, appointed by the Pastor, and approved by the church. He shall coordinate all activities concerned with the educational function of the church. He shall chair the Board of Christian Education. He shall regularly report his activities to the Pastor.

Should the Pastor die or resign, the Minister of Education shall be subject to the Deacon Board during the search for a new Pastor. He cannot be a member of the Pulpit Committee. Upon selection of a new Pastor, this position shall become vacant.

Section 7 - Other Staff Ministers

As the opportunity presents itself, other ministers on the staff shall be responsible to the Pastor for specific duties deemed necessary by the Pastor concerned with smooth functioning of the St. Phillips Baptist Church. Each minister shall report regularly to the Pastor for all activities related to assigned duties.

Section 8 - Music Coordinator

The Music Coordinator shall be charged with the responsibility of coordinating worshipful music for all services and departments of the church, and shall have general oversight of

all components of the Music Department. He/She is to cooperate fully with the Pastor and other leaders in recommending suitable music for all occasions where such services are needed.

Section 9 - Youth Activities Director

The Youth Activities Director shall be appointed by the Pastor and responsible for all activities related to the nurture and well being of the Youth of St. Phillips Baptist Church. He/She shall work cooperatively with the Pastor in interpreting his vision for the nurture and growth of the Youth.

Section 10 - Termination

Any church staff member wishing to resign shall give at least two (2) weeks notice in writing to the Pastor.

ARTICLE VIII - CHURCH AUXILIARIES

All church auxiliaries and departments shall be approved as needed by the Pastor to accomplish the wholesome functions of the church. Should an auxiliary or department no longer be needed, it shall be abolished by the Pastor and members.

ARTICLE IX - STANDING COMMITTEES

Any committee required to aid in the furtherance of the church's function and mission shall be created by the Pastor. That committee will exist for the duration specified by the Pastor.

ARTICLE X - CHURCH GOVERNMENT

Section 1 - The government of St. Phillips Baptist Church shall be in the hands of the members in good and regular standing. The majority of members present and voting shall constitute a quorum for the transaction of church business.

Section 2 - "Good and regular standing" shall be defined as pertaining to those members who fulfill all qualifications under Article V., Section 1,2, and 3 of this document.

Section 3 - The church year shall begin January 1st and run through December 31st.

Section 4 - The Regular Church Business Meetings shall be tri-annually as follows:

1) January on Saturday at noon, following the third Wednesday
2) May on Wednesday at 8:00 P.M. on the third Wednesday in that month
3) September on Wednesday at 8:00 P.M. on the third Wednesday in that month

Special meetings may be called at the time specified by the Pastor. All regular and special meetings of the church shall be proceeded by a two (2) week notice in the Church Bulletin and/or public announcement during worship services except when such advance notice impedes the due transaction of business matters.

Section 5 - The Pastor may convene the church in special meetings for called business meetings whenever he deems it expedient. The Chairman of the Deacon Board may convene the church for special or called business meetings by authority from the pastor or when the church is without a Pastor. No Church Business Meeting shall be held on Sundays except for emergencies, election of Pastor's Nominating Committee, or the calling of a Pastor in the event of death or resignation of the current Pastor.

Section 6 - The Pastor or his designee shall be Moderator of all special and regular meetings of the church whenever held. All such meetings shall open and close with prayer.

Section 7 - If necessary, the majority vote of all members in good and regular standing in attendance at the regular Sunday worship service can force the call of a special business meeting to declare the pulpit vacant.

Section 8 - Each member in good and regular standing wishing the speak at a church meeting shall first raise his/her hand and respectfully address the Moderator to gain recognition to speak. The Moderator shall call to order any member who introduces any issue foreign to the current subject under consideration, and he shall not allow any member to indulge in discourtesies.

ARTICLE XI - MISCELLANEOUS

Section 1 - Copies of this Church Constitution, Rules, and Regulations adopted by the St. Phillips Baptist Church are available by member request from the Church Secretary or designee.

Section 2 - No meetings of any organizations, groups, committees, or auxiliaries shall be held on the church property during the progress of any Sunday worship service, whether in the AM or PM. This will not apply to the Nursery Program when in operation.

ARTICLE XII - ADOPTION AND AMENDMENT

Section 1 - This Church Constitution shall be considered adopted if a majority of the members present at the Church Business Meeting to which it is proposed for adoption shall vote in favor of adoption.

Section 2 - Any of the rules and regulations of this Church Constitution may be amended, altered, or repealed by a majority vote of the members present at any Regular Church Business Meeting, provided that such action is proposed in writing at the preceding Regular Church Business Meeting.

Section 3 - Once adopted, this Church Constitution shall effect a repeal of all previously adopted Church By-laws which are not readopted herein.

Section 4 - A copy of this Church Constitutional shall be kept at all times with the official church records maintained

by the Church Clerk, along with any amendments to or revisions thereto.

Section 5 - Each family of the church shall be furnished copies of this Church Constitution. New families that unite with this fellowship shall obtain a copy as part of their New Members Packet.

APPENDIX I

IN THE
SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

CIVIL DIVISION

DEACON CALVIN BUSSEY
2615 Brentwood Road, N.E.
Washington, D.C. 20018

DEACON ERNEST AVERY ASST.
116 Madison Street, N.W.
Washington, D.C. 20011

DEACON CALVIN TURNER
3267 Queenstown Drive #103
Mt. Ranier, Maryland 20722

DEACON BOBBYE SEARS
5055 12th Street, N.E.
Washington, D.C. 20017

DEACON JAMES BRANCH
6408 MacArthur Blvd.
Brookmount, Maryland 20016

MEMBERS OF BOARD OF DEACONS
OF ST. PHILLIPS BAPTIST CHURCH

TRUSTEE EARL G. JONES
2830 - 30th Street, N.E.
Washington, D.C. 20018

TRUSTEE JUDY DAVIS ASST.
6103 Lamont Drive
New Carrollton, Maryland 20784

TRUSTEE FLOYD GRAYSON
4416 Nash Street, N.E.
Washington, D.C. 20019

TRUSTEE WILBERT JONES
11900 Ambrosa Lane
Fort Washington, Maryland 20744

TRUSTEE WILLIE FOSTER
1224 Farragut Place, N.E.
Washington, D.C. 20018

MEMBERS OF BOARD OF TRUSTEES
OF ST. PHILLIPS BAPTIST CHURCH, INC.

Plaintiffs,

vs.

ANDRE H. OWENS
Pastor of St. Phillips
Baptist Church, Inc.
1435 - 35th Street, S.E.
Washington, D.C.

Defendant.

Civil Action No. 90-9418

COMPLAINT FOR WRONGFUL REMOVAL OF MEMBERS OF THE JOINT BOARD OF ST. PHILLIPS BAPTIST CHURCH, INC., ILLEGAL TAKEOVER OF CHURCH BUSINESS AND LEGISLATIVE AFFAIRS, AND TO PRESENT CHURCH FINANCES.

(INJUNCTIVE RELIEF)

Jurisdiction: Jurisdiction of this Court rests in Title 29-532, et. seq. Title 11-21 et seq.

COUNT I

1. That the plaintiffs are members in good standing of St. Phillips Baptist Church, Inc., and have been such for many years.

2. That St. Phillips Baptist Church, Inc., is a congregational type, a non profit Religious body, incorporated under the laws of the District of Columbia, on or about September 20, 1993.

3. That the plaintiffs, each of them were duly elected as Trustees or Deacons of St. Phillips Baptist Church, Inc., and have served faithfully for a number of years under the mandate of the Holy Scripture and the By-Laws duly enacted in 1974 and amended in 1976, further these By-Laws were in effect when defendant was employed to be pastor of this Church Congregation.

4. That for the past few years defendant has become dissatisfied by the By-Laws and Commenced a Campaign to have them set aside or modified to vest in himself power and authority over the business affairs of this Church Congregation.

5. That Plaintiffs and the members resisted the move by defendant to change the By-Laws and vest power over the church business affairs in defendant - pastor.

6. That historically the Joint Board - consisting of the Deacons and Trustees have successfully and faithfully managed all business affairs of the church.

7. That on or about June 3, 1990 defendant on his own presented a document which he had drafted, entitled Church Constitution Rules and Regulations, (See exhibit 1 attached), where he changed the form of government of the church. That on June 13, 1990, he in an illegal meeting did have the document approved by persons who did not know or understand its importance.

8. That this alleged Constitution drafted, and written by defendant, seeks to oust the Joint Board and Cancel its authority,

it seeks to prohibit them from their lawful duties to this Church, and alleges that "Problems are to be handled accordingly to Wholesome Christian Practices in the Word of God", The Holy Bible, IV, but fails to state where, and what procedures are to be used.

9. That pursuant to the takeover of the business affairs of the Church, defendant, has by letter notified all members of The Joint Board, the Plaintiffs, herein that they are no longer Trustees or Deacons. That no Show Cause or Charges of Misconduct has been issued to plaintiffs, and they have had no opportunity to be heard.

10. That defendant has had elected or appointed other Trustees and Deacons. All of whom are unqualified, inexperienced, and tools of defendant's illegal scheme to take over the resources of this Church.

11. That there is now $74,000.00 in a Savings Account, but a minimum balance is in a Checking Account at Citicorp Savings of approximately $2,500.00 or more. Defendant really seeks control of these resources and funds which has been collected by sacrificial donations for many years.

12. That great dissention and confusion now exists within the congregation.

13. That irreparable harm is threatened to this church and its resources. Defendant is now pursuing a course of Conduct where he is intimidating every club, and organization within the church to cut off any protest to his takeover scheme.

WHEREFORE, the premises considered, plaintiffs pray as follows:

1. That the plaintiffs be restored to their positions as Trustees/Deacons and members of the Joint Board, Pendente lite and permanently.

2. That defendant be enjoined from withdrawing by and through his agents, servants, any funds from the savings, or checking account. Withdrawing any accounts from the contract.

3. That the document written by defendant and alleged to be the constitution be declared Null and Void and without any effect.

4. For Costs, and Damages of $250.000.00 and Counsel equitable to plaintiffs.

/s/ Dovey Roundtree
DOVEY J. ROUNDTREE, ESQ. 043588A
1822 Eleventh Street, N.W.
Washington, D.C. 20001
(202) 723-1422/23

AND

/s/ Patricia Ricks
PATRICIA RICKS

Counsel for Plaintiffs

/s/ James A. Brunch
/s/ Floyd Grayson
Trustee
/s/ Earnest O. Avery
/s/ Judy Davis
/s/ Calvin A. Bussey
/s/ Earl G. Jones
/s/ Wilbert C. Jones
/s/ Willie Mae Foster
/s/ Calvin Turner
/s/ Bobbye Sears

SUBSCRIBED AND SWORN to before me this ____ day of August, 1990.

NOTARY PUBLIC, D.C.

JURY DEMAND

COUNT II

1. That plaintiffs incorporate by reference the matters and things set forth in Count I.

2. That defendant, his agents did conspire to abolish the By-Laws of the Church, since January 1, 1990, have constantly tried to destroy the unity of the Church and its Congregational form to establish a dictatorship in him.

3. That defendant and his agents have boldly schemed to take over the savings funds of $74,000.00 and other assets of plaintiff's church, all in violation of the Civil Law and the By-Laws of 1974 as Amended.

4. That defendant and his agents, alleged successors have violated the right and privilege of Religious Freedom.

WHEREFORE, the premises considered, Plaintiffs' pray:

1. For an injunction, Temporary Restraining Order, Preliminary Injunction against defendant and his agents from generating or attempting to bleed the Church.

/s/ Earnest O. Avery
/s/ Calvin A. Bussey
/s/ Calvin Turner
/s/ Bobbye Sears
/s/ James A. Brunch
DEACONS
/s/ Earl G. Jones
/s/ Judy Davis
/s/ Wilbert C. Jones
/s/ Willie Mae Foster
/s/ Floyd Grayson
TRUSTEES
ALL OF JOINT BOARD

JURY DEMAND

/s/ Dovey J. Roundtree
DOVEY J. ROUNDTREE

APPENDIX J

DISTRICT OF COLUMBIA COURT OF APPEALS
Nos. 93-CV-313 & 93-CV-879

Calvin Bussey, et. al,

Appellants,

vs.

Andre H. Owens,

Appellee.

PETITION FOR REHEARING EN BANC

APPELLANTS Petition the Court for a Rehearing en banc in the above consolidated appeals. In support of this Petition, Appellants state to the Court as follows:

(I)

POINTS OF LAW WHICH, IN APPELLANTS' OPINION, THE COURT OVERLOOKED

The Consolidated Appeals came before the Court for Review of Trial Court action in two (2) cases. Both cases were filed by Appellants in the lower court. After hearing oral arguments on December 14, 1994, the Court issued a Memorandum and Judgment on December 15, 1994 affirming trial court action in both cases which resulted in both appeals. In affirming the Trial Court's Order that Appellant's First Amendment Arguments were not timely raised in the Trial Court and because Appellants had consented to an agreement from which they failed to appeal an Order by the trial Court enforcing that agreement [in the first action], this Court overlooked, or misapprehended, significant points of law.

1. This Court refused, or either failed, to revisit *United Methodist Church v. White,* 571 A. 2d 790 (App. D.C., 1990), in which the Court held that Trial Courts are not proper forums for the adjudication of disputes between a church and its Pastor.

In so doing , this Court overlooked a trinity of authorities clearly defining the constitutional boundaries of trial court action and the immunity granted to religious institutions.

2. This Court, misapprehended the current state of the law on questions relative to application of the doctrine of res judicata. Moreover, this Court failed to apply the rules of law enunciated by It in *Clay v. Faison*, 5834 A. 2d 1388 (App. D.C., 1990). In *Clay v. Faison, supra*, this Court held that where an action is dismissed because of lack of jurisdiction, such an order of dismissal does not carry res judicata consequences because the Court, in effect, reasoned that It did not have subject -matter jurisdiction. *Clay v. Faison*, at pages 3817-3819; *Cf. Stebbins v. Keystone Ins. Co.*, 156 U.S. App. D.C. 326, 481 F. 2d 501, 508 (1973); *See also*, Restatement (Second) Judgments, Sec. 20 (1)(a), Comment a (1980); 1B J. Moore's Federal Practice, Sec. 409 (1-2) (2nd ed., 1988).

3. Factually, it does not matter whether an Appellee or Appellants introduces a trial court to an action which "rings" of First Amendment issues under the Free Exercise and Establishment Clauses. That issue becomes, indeed, irrelevant. The Trial Court's prohibited action and intrusion in a religious dispute, and this Court's invokement of purely rules of state substantive law and/or procedure, violate, yet, another point of law which this Court overlooked, or misapprehended. Article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; the Contrary notwithstanding." Art. VI, cl. 2. Commencing with the Supreme Court's decision in *McCulloch v. Maryland*, 4 Wheat 316, 427 (1819), the law has been well settled that state law which conflicts with federal law is "without effect." *See also, Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). In other words, the issue is whether or not First Amendment issues, whether raised or not raised by either party, constitutes a PREEMPTION by Federal Law. *Malone v. White Motor Corp.*, 435

U.S. 497, 504 (1978); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). State Law, and procedure, do not carry an interest of the highest order, for it is only those types of considerations which can overbalance legitimate claims to the free exercise of religion. *Wisconsin v. Yoder*, 4096 U.S. 205, at 215 (1972).

When Appellants filed a second civil complaint alleging violation of the First Amendment by the trial Court [in the first civil action], this Court was duty bound to address that particular constitutional issue rather than "side stepping" the issue and supporting Its action by reliance on the Superior Court Civil Rules of Procedure, or the Court's interpretation of District of Columbia substantive law. To ignore Constitutional issues is to "invite the conflict."

The United States Supreme Court has traditionally held, in a Litany of Cases, that the First Amenment's Establishment and the Free Exercise Clause preclude civil courts from reviewing ecclesiastical disputes. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976); *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Chruch*, 344 U.S. 94, 116 (1952). This Court has, in past cases, abided by those Rules of Decision by the United States Supreme Court. *See Williams v. Mount Jezreel Baptist Church*, 589 A. 2d 901 (App. D.C., 1981); *United Methodist Church, etc v. White, supra.*

This Court, in following Unites States Supreme Court decision, and prior decisions by this Court, misapprehended the state of the law relative to First Amendment considerations which It has faithfully adhered to in the past. For example, *see, Williams v. Mount Jezreel Baptist Church, supra*; *United Methodist Church v. White, supra*; *Burgess v. Rockcreek Baptist Church*, 734 F. Supp. 30 (D.D.C., 1990); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F. 2d 1354

(D.C. Cir. 1988). The Fifth Circuit Court of Appeals has followed the rule regarding the prohibition by civil courts in ecclesiastical matter which are outside the realm of civil courts. *McClure v. Salvation Army*, 460 F. 2d 553, 558-59 (5th Cir., 1972). *See also, Hutchison v. Thomas*, 789 F. 2d 392 (6th Cir.); *Kaufman v. Sheehan*, 707 F. 2d 355 (8th Cir., 1983).

4. In determining whether the complaint calls for the constitutionally impermissible review of ecclesiastical matters, "the Court must look beyond the allegations of the complaint to ascertain what lies at 'the heart of the controversy'" *See Congregation Beth Yitzhok v. Briskman*, 566 F. Supp. 555, (E.D.N.Y., 1983) (*citing Kedroff supra*, 344 U.S. at 122).

CONCLUSION

In view of the foregoing Points and Authorities, the Petition for rehearing en banc should be granted.

/s/_____
CLEMENT THEODORE COOPER, #2576
ATTORNEY FOR APPELLANTS
[PETITIONERS]

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Pleading was mailed, postage prepaid, to: James T. Wright, Esq., 805 Florida Ave. N.W., Washington, D.C. 20001, this day of DECEMBER, 1994.

/s/_____
CLEMENT THEODORE
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ATTORNEY FOR
APPELLANTS
[PETITIONERS]